No. 86-1122 (4)

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

RUTH V. SMITH, Administratrix
of the Estate of HARRY F. SMITH, Deceased
and
RITA LADZENSKY, Administratrix of
the Estate of GERALD LADZENSKY, Deceased
and
CHARLES ALEXANDER SCOTT,

Appellants

v.

CITY OF PHILADELPHIA, et al.,

Appellees

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APPEAL FROM THE JUDGMENT
OF THE SUPREME COURT OF PENNSYLVANIA

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# MOTION OF APPELLEE ATTORNEY GENERAL OF PENNSYLVANIA TO DISMISS OR AFFIRM

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25pp

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF CITATIONS..... | ii |
| MOTION OF THE ATTORNEY GENERAL OF PENNSYLVANIA TO DISMISS OR AFFIRM..... | 1 |
| QUESTION PRESENTED..... | 2 |
| STATEMENT OF THE CASE..... | 3 |
| THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION..... | 5 |
| 1. The Decision Of The Pennsylvania Supreme Court Is Consistent With This Court's Decision In Duke Power And With Its Established Principles Of Analysis Of Social And Economic Legislation.... | 7 |
| 2. A Decision By This Court To Affirm Or Dismiss In This Case Would Be Consistent With Recent Actions Denying Review To Cases Upholding Statutes Such As That Involved In This Case..... | 17 |
| CONCLUSION..... | 20 |

## TABLE OF CITATIONS


| Case(s) | Page(s) |
|---|---|
| Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978)..... | passim |
| Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665 (1985), appeal dismissed, 54 U.S.L.W. 3250 (October 15, 1985)..... | 14, 17, 18 |
| Hodel v. Indiana, 452 U.S. 314 (1981)..... | 12, 13 |
| Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976)..... | 13 |
| Ryszkiewicz v. New Britain, 193 Conn. 589, 479 A.2d 793 (Conn. 1984)..... | 19 |
| Vance v. Bradley, 440 U.S. 93 (1979)..... | 13 |
| White v. State of Montana, 661 P.2d 1272 (Mont. 1983)..... | 19 |
| Williamson v. Lee Optical, 348 U.S. 483 (1955)..... | 13 |
| U.S. Constitution: | |
| Fourteenth Amendment..... | passim |

## TABLE OF CITATIONS


| | Page(s) |
|---|---|
| **Statutes:** | |
| Price-Anderson Act, 42 U.S.C. §2210 et seq. (1970 ed. and Supp. V)..... | 5, 8, 10, 14 |
| Political Subdivision Tort Claims Act, Act of November 28, 1978, P.L. 1399, No. 330, §101 et seq., repealed and reinstated by the Act of October 5, 1980, P.L. 693, No. 142, Section 221(i) Pa. C.S. §§ 8541-8564, 42 Pa. Cons. Stat. §§ 8541-8564..... | passim |
| 42 Pa. Cons. Stat. § 8501..... | 4 |
| **Rules:** | |
| Rule 10.4, Rules of the Supreme Court of the United States..... | 3 |
| Pa. R.A.P. 521(b)..... | 3 |
| **Miscellaneous** | |
| Annot., 43 A.L.R. 4th 19 (1983)..... | 19 |

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## MOTION OF THE ATTORNEY GENERAL OF PENNSYLVANIA TO DISMISS OR AFFIRM

Appellee, the Attorney General of the Commonwealth of Pennsylvania, moves the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Supreme Court of Pennsylvania on the ground that the questions on which the decision of the appeal depends are so insubstantial as not to need further argument.

## QUESTION PRESENTED

Whether a statute which allows suits against political subdivisions but which limits the damages recoverable from them violates the Equal Protection Clause of the Fourteenth Amendment.

## STATEMENT OF THE CASE[1]

The appellants challenge a provision of Pennsylvania's Political Subdivision Tort Claims Act ("the Act")[2] which limits to $500,000 the damages which can be recovered in an

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[1]Appellee Attorney General of Pennsylvania was deemed to be an intervenor in the appeal before the Pennsylvania Supreme Court pursuant to PA.R.A.P. 521(b) which allows the Attorney General to be heard in any case where the constitutionality of a state statute is called into question. As an appellee-intervenor before the Pennsylvania Supreme Court, the Attorney General of Pennsylvania is a proper party, as an appellee, in the case before this Court. See Rule 10.4, Rules of the Supreme Court of the United States.

[2]Political Subdivision Tort Claims Act, Act of November 28, 1978, P.L. 1399, No. 330, §101 et seq., repealed and reinstated by the Act of October 5, 1980, P.L. 693, No. 142, Section 221(1) Pa. C.S. §§8541-8564, 42 Pa. Cons. Stat. §§8541-8564.

action against a "local agency." Id.[3] Appellants claim that this damage limitation violates the Equal Protection Clause of the Fourteenth Amendment.

The trial court declared the provision unconstitutional under both the Pennsylvania and Federal constitutions. The Pennsylvania Supreme Court however, reversed and held that the provision violated neither the Pennsylvania Constitution nor the Equal Protection Clause. This appeal followed.[4]

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[3]A"local agency" is defined as "[a] government unit other than the Commonwealth government." 42 Pa. Cons. Stat. §8501.

[4]Appellants seek review only of the determination that the damages cap does not violate the Equal Protection Clause. The provisions of the Pennsylvania Constitution are not at issue here. J.S. 4, n.3.

## THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

While appellants devote considerable time to arguing what they consider to be the underlying equities of this case, they purport to raise only one substantial federal question. They claim that the decision of the Pennsylvania Supreme Court is inconsistent with this Court's decision in Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) (Duke Power). This inconsistency is said to stem from the fact that the Pennsylvania Act has none of the characteristics relied upon by this Court in Duke Power in upholding the Price-Anderson Act's damage limitations provisions.

In fact, no substantial federal question is posed by this case. Quite aside from the fact that Duke Power itself upheld a statute with a per occurrence damage limitation in the face of a Fifth Amendment due process challenge, there is no inconsistency between the rationale of Duke Power and the analysis employed by the Pennsylvania Supreme Court. Moreover, even a cursory examination of this Court's cases involving equal protection challenges to social and economic legislation reveals that the decision of the Pennsylvania Supreme Court is fully consistent with that precedent. The appeal should be dismissed, or the decision below should be affirmed.

1. The Decision of the Pennsylvania Supreme Court is Consistent With This Court's Decision in Duke Power and With its Established Principles of Analysis of Social and Economic Legislation.

a. Appellants purport to find an inconsistency between this Court's decision in Duke Power and the decision of the Pennsylvania Supreme Court in this case. No such inconsistency is present. Even taking into account the unanswered question in Duke Power, viz., whether the Due Process Clause requires that "a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy," Duke Power, 438 U.S. at 88, no substantial federal question is presented by this case.

Appellants do not raise this unresolved issue, but rather see an inconsistency in the characteristics of the Price-Anderson Act, upheld in Duke Power, and the Pennsylvania Act at issue here. They contend that because the Pennsylvania Act has none of the characteristics of the Price-Anderson Act, the Pennsylvania Supreme Court's decision cannot be reconciled with Duke Power. J.S. 8-9.

Appellants miss the point of Duke Power. The analysis of the Price-Anderson Act's characteristics was not undertaken to formulate criteria against which all other statutes which create limitations on damages are to be evaluated. Rather, this Court examined the Price-Anderson Act in the context both of the unresolved question presented

in the case and the longstanding recognition that this Court's cases "have clearly established that '[a] person has no property, no vested interest, in any rule of the common law'" and that the "'Constitution does not forbid the creation of new rights, or abolition of old ones recognized by the common law, to attain a permissible legislative object.'" Duke Power, 438 U.S. at 88, n. 32 (citations omitted).[5] Without resolving the question of whether a legislatively enacted compensation scheme must provide a reasonably just substitute for the common-law or state tort law remedies it replaces, the Court

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[5]As the Court noted, "statutes limiting liability are relatively commonplace and have consistently been enforced by the courts." Id.

found the Price-Anderson Act did provide "a reasonably just substitute" for the remedies it replaced.

The inquiry, therefore, is not whether a statute possesses the same characteristics as the statute under consideration in Duke Power, but whether, in light of the general principles that there is no property interest in a common law rule and that such rights may be abolished to attain permissible legislative ends, a statute is so devoid of remedial value as to offend due process. It is thus the characteristics which a statute in fact has, and the legislative objective aimed at, which are relevant under Duke Power.

b. While appellants rely on the due process analysis in Duke Power, their true challenge is based on the Equal Protection Clause. As in Duke Power, appellants' "equal protection arguments largely track and duplicate those made in support of the due process claim." Duke Power, 438 U.S. at 93, a claim rejected by this Court. Analyzing the Political Subdivision Tort Claims Act under this Court's caselaw involving equal protection challenges to social and economic legislation, it is clear that the Pennsylvania Act survives scrutiny.

Appellants concede that the Pennsylvania legislature could simply abolish all actions against the Commonwealth or its political subdivisions.

J.S. App. A-3.[6] They claim, however, that once having allowed some actions, the legislature cannot, consistent with equal protection, limit the damages recoverable. This conclusion is simply not supported by this Court's caselaw, and was properly rejected by the court below.

As this Court pointed out in Hodel v. Indiana, "[s]ocial and economic legislation . . . that does not employ suspect classification or impinge on fundamental rights must be upheld against

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[6]In light of appellents' concession that the remedy could be abolished entirely, their argument (J.S. 5) that the statute does not further the legislative purpose of providing some recovery for tort victims borders on the frivolous. The statute has several opposing purposes which it has reconciled by permitting some, but not necessarily complete, recovery.

equal protection attack when the legislative means are rationally related to a legitimate governmental purpose." 452 U.S. 314, 331-332 (1981)(citation omitted). Moreover, "such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." Id. Such legislation is valid unless "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's action was irrational." Vance v. Bradley, 440 U.S. 93, 97 (1979). See also Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976); Williamson v. Lee Optical, 348 U.S. 483 (1955).

In this case, the Pennsylvania Supreme Court held that the statute satisfied not just the rational basis test, but also the "intermediate" or "heightened scrutiny" test which the court held was applicable. J.S. App. A-8.[7] The court held that the need to preserve the public treasury in order

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[7]Appellee argued below that the rational basis test was appropriate. Appellee maintains that position here. Statutes limiting damages are precisely the sort of social and economic legislation to which this standard applies. Duke Power, relied upon by appellants, is not to the contrary. Duke Power, 438 U.S. at 93 ("the general rationality of the Price-Anderson Act liability limitations . . . is ample justification for the difference in treatment."). See also Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665 (1985), appeal dismissed 54 U.S.L.W. 3250 (October 15, 1985).

to both allow recovery for damages and continue to provide needed public services provides ample justification for the statute even under heightened scrutiny. A fortiori, the statute satisfies the rational relationship standard, and does not violate the Equal Protection Clause.

Appellants' claim that the limitation is capricious because an individual's potential recovery is affected by how many others are injured in the same incident (J.S. 6), fails to consider that the statute has an impact on the interests of both the alleged tortfeasor and the victims. Appellants take no issue with the obvious fact that there are strong state interests in protecting municipalities from ruinous

liabilities. While claims may be predictable within limits, it is the mass disaster situation which is most unpredictable and most likely to bankrupt a local government unit. It is entirely appropriate for the state legislature to put municipalities on the same footing as private parties, whose liability is effectively limited by insurance coverage.

In conclusion, the decision of the Pennsylvania Supreme Court is wholly consistent with this Court's equal protection jurisprudence. Appellants completely fail to show how the Political Subdivision Tort Claims Act violates the Equal Protection Clause under the heightened standard of review employed below, to say nothing of the appropriate -- and far less restrictive -- rational basis test. Because this statute plainly

survives scrutiny, appellees submit that this case is an improper vehicle to examine the question left open in Duke Power, particularly when there is no inconsistency between Duke Power and this case below.

2. A Decision by This Court to Affirm or Dismiss in This Case Would be Consistent With Recent Actions Denying Review to Cases Upholding Statutes Such as That Involved in This Case.

This Court recently dismissed an appeal for want of a substantial federal question in a case closely analogous to the instant appeal. In Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665 (1985), appeal dismissed 54 U.S.L.W. 3250 (October 15, 1985), appellants sought

review of a decision of the California Supreme Court which upheld, against an equal protection challenge, a California statute which placed a cap on non-economic damages recoverable in medical malpractice cases. That decision relied squarely on consideration of the legislature's "clearly . . . reasonable basis" in enacting the damages cap in rejecting the plaintiff's equal protection arguments based on the alleged discrimination between medical malpractice and other types of plaintiffs, or between economic and non-economic damages. See discussions at 695 P.2d 683-684. Neither the instant appeal, nor any intervening decision of this Court, requires a result different from that in Fein. The instant case presents no

substantial federal question, and the decision below should be affirmed or the appeal dismissed.[8]

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[8]Appellants cite White v. State of Montana, 661 P.2d 1272 (Mont. 1983), apparently to indicate a conflict among state appellate courts on this issue. In fact, on the specific issue addressed in this case -- the validity of a statute placing a limit on damages recoverable against a governmental unit -- there is virtual unanimity among the states that such statutes are constitutional. See Annot. 43 A.L.R. 4th 19 (1983). Indeed, Montana stands alone in holding such statutes violate the Equal Protection Clause. Id. at 34-35. (A Connecticut municipal ordinance, applicable only to that municipality, was struck down in Ryszkiewicz v. New Britain, 193 Conn. 589, 479 A.2d 793 (Conn. 1984)).

## CONCLUSION

The appeal should be dismissed or the decision below should be affirmed.

Respectfully submitted,

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